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HOW THE ACT IS MEANT TO WORK

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USDA FOREST SERVICE
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NO. 32

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# The Meaning Behind ARPA: How the Act is Meant to Work

By Robert Bruce Collins

The Act for Preservation of American Antiquities 1/ served as the sole bastion of protection for cultural resources in America from the date of its passage in June 1906, until nearly 70 years later. In 1974, the Ninth Circuit Court of Appeals, in United States v. Diaz, 2/ struck down the Antiquities Act, holding that it was unconstitutionally vague. In Diaz, an Arizona man was prosecuted under the Antiquities Act for appropriating "objects of antiquity" from the San Carlos Indian Reservation. The "objects of antiquity" removed by Diaz from the reservation were war masks that had been carved by a medicine man 3 or 4 years prior to the trial. Diaz was convicted and appealed his conviction to the United States District Court. The conviction was affirmed by the district court. Diaz appealed the district court's decision to the Ninth Circuit Court of Appeals on the ground that objects 3 or 4 years old should not come within the ambit of the Antiquities Act. The court declared the statute to be unconstitutionally vague writing that, "Protection [provided by the Act], however, can involve resort to terms that, absent legislative definition, can have different meanings to different people. One must know, with reasonable certainity, when he has happened on an area forbidden to his pick and shovel and what objects he must leave as he has found them. Nowhere here do we find any definition of such terms as 'ruin' or 'monument' (whether historic or prehistoric) or 'object of antiquity.'" Thus, the Diaz decision precluded prosecution under the Antiquities Act of those who excavated ruins or appropriated artifacts in the Ninth Judicial Circuit, which included most of the far western states. 3/

Challenges to the Antiquities Act increased after the Diaz decision and the decision cast a dark shadow on all antiquities' prosecutions in the country. The effect of Diaz was felt particularly in those western states of the Ninth and Tenth Judicial Circuits. 4/ In three cases, which arose in New Mexico, the challenge to the constitutionality of the Antiquities Act, based on the Diaz opinion, was a central issue.

In United States v. Quarrell, 5/ two Deming men were charged with violating the Antiquities Act for excavating a site in the Gila National Forest and were convicted at a trial in May 1976, before a United States Magistrate in Las Cruces, New Mexico. During the trial, defense counsel argued to the court that the case should be dismissed because the Act was unconstitutionally vague under the rationale of Diaz. The magistrate upheld the constitutionality of the Act, holding that the Act was not vague because the 800 or 900 years old artifacts excavated by the defendants were unquestionable "objects of antiquity."

In United States v. Camazine, 6/ a Harvard medical student was charged with excavating a prehistoric ruin, inhabited from approximately A.D. 1100 to A.D. 1200, on the Zuni Indian Reservation. Before the July 1977, trial in U.S. Magistrate Court in Albuquerque, defense counsel filed a motion to dismiss the complaint, claiming the Antiquities Act was unconstitutionally

vague. After hearing arguments of counsel, the magistrate granted the motion to dismiss, holding that the Antiquities Act was unconstitutionally vague as applied to the facts of the case.

Naturally, the U.S. Magistrate's decision in Camazine left a serious question as to the continuing validity of the Act in New Mexico and other states in the Judicial Circuit. However, in October 1977, two commercial pottery hunters, William Smyer and Bryon May, were prosecuted under the Antiquities Act for looting two prehistoric Mimbres ruins in the Gila National Forest. 7/ In United States v. Smyer and May, evidence was introduced by the United States Attorney during pre-trial hearings and the trial, that included skeletal remains of 10 human beings that had been scattered around the site by the vandals, and an 8 x 10 photograph of one of the defendants on the site with a human skull on his head and long bones in each hand. Additionally, the defendants admitted during trial that they had sold two of the Mimbres bowls removed from the ruin for $4,000.

As in the Quarrell and Camazine cases, counsel for Smyer and May filed a motion to dismiss the complaint before trial, asserting that the Antiquities Act was unconstitutionally vague. After a hearing in which the judge heard testimony from archeologists that dated the ruins and artifacts excavated at 800 to 900 years old, United States District Judge Howard Bratton found the Antiquities Act to be constitutional, writing: "The words 'ruin' and 'monument' plainly require no guessing at their meaning, and the term 'objects of antiquity' is no less comprehensible. Webster's Third New International Dictionary defines 'antiquity' as 'ancient time; times long since past,' so an object of antiquity is an object of or from ancient times or times long since past." The judge, holding the Antiquities Act was not unconstitutionally vague, continued: "It is clear that the acts alleged . . . fall squarely within the prescription of the Antiquties Act. In light of what the evidence . . . indicated was the defendants experience with Indian artifacts and the age of the artifacts . . . the argument that the defendants could not reasonably have had notice from the language of the Antiquities Act that their alleged activities violated that statute is simply not credible. When measured by common understanding and practice, it is evident that the language of the Act is not indefinite, vague or uncertain."

The case was tried before Judge Bratton in early January 1978. Judge Bratton found Smyer and May guilty and sentenced them to imprisonment for 90 days on each of the eleven counts charged, the periods of confinement to run concurrently. The defendants promptly appealed their conviction to the Tenth Circuit Court of Appeals. 8/

Meanwhile, in Arizona, the United States Attorney's office attempted to circumvent the impact of the Diaz decision in the antiquities prosecution, United States v. Jones, 9/ by charging the looters under the Theft of Government Property statute. However, in Jones, U.S. District Judge Copple ruled that more general statutes, such as Theft or Depredation of Government Property, were not available to prosecute antiquities violations. The judge held: "The Antiquities Act is thereby the exclusive means by which the government could prosecute the conduct alleged in this action. The holding in Diaz, supra, leaves a hiatus which the Congress

should correct by appropriate legislation." 10/ The lesson of Jones was clear, new antiquities legislation was desperately needed if prosecutors in the Ninth Judicial Circuit were to have any tools to stem the tide of archeological vandalism.

In addition to the difficulties United States Attorneys around the country were having prosecuting looters under the American Antiquities Act of 1906, other problems with the Act underscored the need for new legislation.

The American Antiquities Act of 1906 prohibited only the appropriation, excavation, injuring or destruction of prehistoric or historic ruins, monuments or objects of antiquities and did not prohibit or impose sanctions for the purchasing, trafficking in, dealing or selling of artifacts. Thus, the 1906 Act did not deal with the heart of the problem -- that is, those who made huge profits by trafficking in illegally obtained artifacts.

Moreover, the penalties provided in the 1906 Act were inadequate to deter the looting of prehistoric ruins. The fine of $500 may have been a stiff penalty in 1906, but it did little, if anything, to stop commercial dealings in artifacts that have commanded prices of $10,000 to $20,000 for a single Mimbres bowl.

It was against this backdrop that Congress responded to the need for new legislation for the protection of antiquities and introduced the Archaeological Resources Protection Act of 1979. The House of Representatives' Bill, H.R. 1825, was sponsored by Congressmen Udall, Runnels, Lujan, Rhodes, Seiberling, Clausen, Rudd and Marriott, and introduced on February 1, 1979. A companion bill, S. 490, was introduced in the Senate on February 26, 1979, and sponsored by Senators Domenici, Schmitt, DeConcini and Goldwater. House and Senate subcommittees held hearings on the bill and the bill passed both houses of Congress in October 1979. The Archaeological Resources Protection Act of 1979 became the law of the land on October 31, 1979, when signed into law by President Jimmy Carter. 11/

The purpose of the Act is stated in Section 2(b):

> The purpose of this Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before the date of the enactment of this Act.

The principal objection of the Court in the Diaz decision was that the terms "ruin," "monument" and "object of antiquity" were not defined in the Antiquities Act and, hence, one did not know, with reasonable certainty "what objects he must leave as he found them." In response to Diaz, the Archaeological Protection Act of 1979 provided a definition of the operative terms in the statute. The new Act avoided the objectionable terms "ruin," "monument" and "object of antiquity" in the 1906 Act in favor of the term "archaeological resource." The Act defines "archaeological resource" as ". . . any material remains of past human life or activities

which are of archaeological interest. . . ." Although the stated definition cures the vagueness problem, the statute contemplated that the agencies will promulgate uniform regulations to further define "archaeological resource." However, the statute provides the following nonexclusive list of those items that are to be considered archeological resources: ". . . pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items." Paleontological specimens are not to be considered archaeological resources unless found in an archeological context. Arrowheads, which are "weapon projectiles," are included within the definition. Although the original draft of the bill included "feces" as an "archaeological resource," Congress excluded feces in the final bill, apparently believing that not all old objects are worthy of protection and preservation. Additionally, the Act resolves the question at what time does an item become an "archaeological resource" by providing that, "No item shall be treated as an archaeological resource . . . unless such item is at least 100 years of age." The 100-year limitation does not weaken the Act significantly, inasmuch as very few antiquities prosecutions have involved artifacts on sites less than 100 years old. For example, all prosecutions in New Mexico under the 1906 Act arose from the theft of artifacts and destruction of sites 800 to 900 years old. Moreover, more recent historical objects on sites can be protected under Theft and Destruction of U.S. Government Property statutes.

The weaknesses of the Antiquities Act 1906 were corrected in Prohibited Acts and Criminal Penalties section of the new Act. 13/ Subsection (a) states that no person may excavate, remove, damage or otherwise alter or deface an archeological resource located on public lands or Indian lands unless he has a permit. This subsection parallels the language in the old statute and focuses on the person who would excavate an archeological site, remove artifacts from the site or damage the site.

The breadth of the 1906 Act is significantly broadened in subsections (b) and (c) of the new statute in that it prohibits all trafficking in illegally obtained artifacts. Subsection (b) provides that no person may sell, purchase, exchange, transport, receive or offer for sale, purchase or exchange archeological resources excavated from public lands or Indian lands in violation of subsection (a) of the new statute or any other regulation, ordinance or other Federal law. Thus, for the first time, a Federal antiquities statute focused on the traffickers and the dealers in the artifacts -- those who reap the huge profits from the illegal activities rather than the poor laborer or illegal aliens hired to do the pick and shovel work on the site. It is significant to note that this subsection prohibits trafficking in artifacts taken in violation of other Federal ordinances or regulation statutes, such as the 1906 Act or Forest Service or National Park Service regulations, even if the artifacts were taken illegally prior to the passage of the new statute. For example, if one illegally looted an archeological ruin located on the Gila National Forest in New Mexico and removed an 800 year old Mimbres bowl the day before the Act was passed, he would be prohibited under subsection (b) from selling, transporting, exchanging or offering for sale or exchange, the Mimbres bowl, the day after the passage of the Act. The rationale of

this subsection is clear -- if one is prohibited from dealing in illegally obtained artifacts, then the profit motive and the incentive to loot prehistoric ruins is eliminated.

Subsection (c) enlists Federal assistance in enforcing state and local antiquities laws. The subsection states that no person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under state or local law. This subsection is designed to prevent one from violating a state antiquities law and fleeing across a state line before local law enforcement agencies are able to respond. For example, one would be prohibitied in the new Act from traveling from Arizona to New Mexico to bulldoze a site on private land without a permit, or to loot a site on state land in violation of New Mexico law and return to Arizona with the artifacts before the local sheriff's office can move to prevent him.

Subsection (d) provides criminal penalties for violating the prohibitions of the Act. The subsection provides that any person who knowingly violates or counsels or solicits or employs any other person who violates any of the prohibitions discussed above, will be fined not more than $10,000 or imprisoned not more than 1 year, or both. The subsection provides that if the commercial or archeological value of the archeological resources involved and the cost of restoration and repair of the resources exceeds $5,000, the person will be fined not more than $20,000 or imprisoned not more than 2 years. In the case of a second or subsequent violation, the person, upon conviction, can be fined as much as $100,000, or imprisoned for as much as 5 years, or receive both penalties.

The penalties reflect the underlying rationale of the Act -- that is, that those who deal commercially in illegally obtained artifacts should be dealt with harshly, and the more damage that those people do to the site and the more valuable the artifact they convert, the greater the penalty. The penalties in the new Act are far different than the weak penalties provided in the 1906 Act and act, for the first time, as a real deterrent to those who would loot archeological sites for commercial gain.

In order to be prosecuted criminally under this section, the person must violate the Act "knowingly." "Knowingly" merely means that the prohibited actions are done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The person need not know that his actions violated the law or even that there was a law prohibiting his actions. Moreover, the person does not have to know that he was on Federal land to violate the Act. During the hearings before the Senate Subcommittee on Parks, Recreation and Renewable Resources, Senator Dale Bumpers of Arkansas asked the U.S. Attorney from Arizona, Michael Hawkins:

> Senator Bumpers: Does not knowingly mean that they have to know that the statute exists?

Mr. Hawkins: I think it simply means that they know what they are doing. They are aware of the conduct they are engaged in, whether or not that is a violation of the law.

Senator Bumpers: Are you telling me that you could charge and convict somebody for going on the land simply because they knew they were going on to federal lands and not because they knew they were violating the law by doing so?

Mr. Hawkins: Under your hypothetical the answer is yes. Whether we would charge that offense or not, I don't know.

Senator Bumpers: Do you think under the definition you just read there that you could do that?

Mr. Hawkins: Yes. If the action that results in the activity covered by the statute is engaged in intentionally and knowingly and not by reason of mistake or accident.

Senator Bumpers: What would you charge some person who went on federal land -- and we will say this is a clear case of proof what would be offered -- that he knowingly went on federal lands and made some archaeological digs and maybe uncovered a Mimbres pot, but did not know -- and it is clear that he did not know that there was a statute prohibiting him from doing so, do you feel that you could convict him under a knowingly clause only?

Mr. Hawkins: Yes. The question of whether I would charge that under the facts you describe or not, is another question. But the straight answer to the question is yes. Contrast that with the requirement for wilfully [sic] which requires you not only to prove intentional action, and knowledge of that intentional action, but a deliberate design and bad motive. And you get to the point where you must, in many cases, immunize members of the criminal organization and get them to testify against their fellow co-conspirators about their state of knowledge before they engaged in the activity. Very difficult to prove. 15/

Thus, the criminal section of the Act makes violations of the Act general intent crimes, rather than specific intent crimes. 16/

During the hearings on the bill, Senator Domenici of New Mexico wanted it to be clear that "possession" of an archeological resource was not to be made a crime by the Act. Additionally, subsection (b) states that prohibitions against selling, transporting, purchasing or receiving illegally obtained artifacts are not applicable to any person ". . . with respect to an archaeological resource which was in lawful possession of such person prior to the date of the enactment of this Act." At first glance, this subsection appears to permit one to sell or purchase artifacts after the date of the passage of the Act if they were possessed prior to the date of the passage of the Act, even though they may have been taken illegally from Federal property. However, a closer analysis of the subsection shows that a person must be in "lawful" possession of the artifact. One cannot have

"lawful" possession of an archeological resource that has been taken illegally from Federal property. Therefore, one cannot traffic in illegally obtained artifacts at any time after the date of the enactment of the Act, even though he had possession of the artifact prior to the Act's passage.

Additionally, even though arrowheads are considered to be "archaeological resources" in the Act, one cannot be prosecuted for ". . . the removal of arrowheads located on the surface of the ground." One can be prosecuted, however, for excavating archeological sites for arrowheads. 17/

The civil penalty section compliments the criminal penalty section and provides the needed flexibility and variety of enforcement measures absent in the 1906 Act. This section was designed primarily to provide an alternative to criminal penalties for the casual tourist and the noncommercial artifact hunter for whom imprisonment would be inappropriate. On the other hand, the civil penalties created in this section can be assessed in addition to criminal sanctions in aggravated circumstances such as a case where commercial artifact hunters damage a site extensively while looting.

The section provides that any person who violates the prohibitions contained in the Act can be assessed a civil penalty. A civil penalty differs from a criminal penalty in that one is penalized monetarily and not by imprisonment. The amount of the civil penalty is to be determined by taking into account, in addition to other factors, the archeological or commercial value of the archeological resource and the cost of restoration and archeological site involved. In the case of a second or subsequent violation of the Act, the amount of the civil penalty can be double the amount of the civil penalty that would have been assessed if the violation were the first violation by the person. Thus, if a person excavated an archeological site on Federal land in search of prehistoric artifacts and damaged the site to the extent that restoration would cost $70,000, then, if it was a person's first offense, he could be assessed a civil penalty of $70,000. However, if it was a second offense, he could be assessed a civil penalty of $140,000. Naturally, the Act provides that before a person may be assessed a penalty under this section, he must be given notice of the violation and an opportunity for a hearing. If the person is aggrieved by the assessment of a civil penalty, he has the right to have the assessment reviewed by a Federal district judge. However, he is not entitled to a new trial before the district court, but only to have the assessment reviewed to ensure that it was supported by substantial evidence. Additionally, just like the criminal penalty section, the removal of arrowheads from the surface is excluded from the provisions of this section.

In order to encourage the general public to assist Federal law enforcement agencies in protecting archeological treasures, the Act creates a reward program. The reward subsection states that any person who furnishes information which leads to the finding of a civil violation, or the conviction of a criminal violation, for which a penalty or fine was paid, shall be paid an amount equal to one-half of the penalty or fine, but not to exceed the sum of $500. One of the early drafts of the bill provided a reward of $1,000 rather than the present $500 figure. However, several members of Congress feared the higher figure might encourage vigilante-type activity

or frivolous allegations aimed at obtaining a large reward. The Congressmen concluded that the $500 figure was "a just, compensatory amount for time and troubles incurred by persons furnishing information leading to a finding of civil violation or the conviction of criminal violation." 19/

During the Congressional hearings on the bill, members of the committee expressed particular concern about the use by commercial artifact hunters of bulldozers, backhoes, and other heavy equipment in the excavation of archeological ruins. That concern was reflected by a provision in the new antiquities law that provided that all vehicles or equipment used by any person in connection with the excavation, trafficking in or interstate transportation of unlawfully obtained artifacts are subject to forfeiture to the United States. The vehicles or equipment can be forfeited at the discretion of the court or the administrative law judge if the person is convicted of a criminal violation or assessed a civil penalty under the Act, or the court determines that the vehicle was involved in a violation of the Act. Thus, for example, a person can have his $200,000 bulldozer confiscated and forfeited to the United States if he was using the bulldozer to excavate an archeological site on Federal property without a permit, even if ultimately, he was not convicted of a violation of the Act. 20/

The Archaeological Resources Protection Act of 1979, by increasing the penalties for violating the Act and broadening the Act to reach those who would deal in illegally obtained artifacts, reflects the economic realities of the 1970's and 1980's and reflects the importance with which the Nation views the protection and preservation of our Nation's historic and prehistoric treasures.

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1/ "An Act for Preservation of American Antiquities." 34 Statutes at Large 225 (1906), 16 U.S. Code 433.

2/ 499 F.2d 113 (9th Cir. 1974).

3/ Those states within the Ninth Judicial Circuit are Arizona, California, Nevada, Idaho, Oregon, Washington and Montana.

4/ Those states within the Tenth Judicial Circuit are New Mexico, Colorado, Utah, Oklahoma, Kansas and Wyoming.

5/ Criminal Information No. 76-4, filed 13 January 1976, U.S. District Court, Albuquerque, New Mexico.

6/ Magistrate No. 77, docket case no. 1416-M, filed 28 July 1977.

7/ United States v. Smyer and May, Criminal Information No. 77-284, filed 15 November 1977, U.S. District Court, Albuquerque, New Mexico.

8/ The Tenth Circuit Court of Appeals affirmed the decision of the district court in United States v. Smyer and May, subsequent to the introduction of The Archaeological Resources Protection Act of 1979. The circuit court expressly disagreed with the Ninth Circuit's Diaz decision and held that "The Antiquities Act gives a person of ordinary intelligence a reasonable opportunity to know that excavating prehistoric Indian burial gounds and appropriating 800 - 900 year old artifacts is prohibited. We find no constitutional infirmity in § 433." Defendants petitioned to the Supreme Court for certiorari, which was denied. William Smyer and Bryon May served 90 days in the Dona Ana County jail.

9/ 449 F. Supp. 42 (D. Az. 1978).

10/ The United States appealed Judge Copple's decision to the Circuit Court for the Ninth Judicial Circuit and subsequent to the passage of the Archaeological Resources Protection Act of 1979, the Ninth Circuit Court reversed the lower court, holding that antiquities violations could be prosecuted under general Theft of Government Property and Malicious Mischief statutes.

11/ Archaeological Resources Protection Act of 1979, Pub. L. 96-95 (enacted October 31, 1979), 16 U.S.C. 470.

12/ Section 3(1).

13/ Section 6.

14/ Hearing before the Senate Subcommittee on Parks, Recreation and Renewable Resources on the Archaeological Resources Protection Act of 1979, No. 96-26, 96th Cong., 1 Sess., May 1, 1979, pp. 57-59.

15/ Ibid, at p. 58.

16/ Report of the Senate Committee on Energy and Natural Resources on the Archaeological Resources Protection Act of 1979, No. 96-179, 96th Cong., 1 Sess., May 15, 1979, p. 9.

17/ Section 6(g).

18/ Section 7.

19/ Report of the Senate Committee on Energy and Natural Resources on the Archaeological Resources Protection Act of 1979, No. 96-179, 96th Cong., 1 Sess., May 15, 1979, p. 10.

20/ Section 8(b).

# PROSECUTING UNDER ARPA: WHAT TO DO UNTIL THE REGULATIONS ARRIVE

By Dee F. Green

## Introduction

With the passage of the Archaeological Resources Protection Act of 1979 (hereafter referred to as the Act), law enforcement officials and prosecutors have a powerful new weapon to use against those who are continuing the massive depredation of this Nation's cultural heritage. That they should wait while the bureaucratic process slowly grinds out the regulations permitted under the law, and the depredations continue, is neither resonable or desirable. As a result, the law has already been used several times. There have been convictions where pleas of guilty have been entered by defendants. The single not-guilty plea, that of Casey Shumway, resulted in acquittal (Fike 1980). Failure to win the case had to do partly with the nature of the legislation but, also, with how the case was developed and presented. The law has a quirk but through understanding that quirk, and how to develop and present a case, successful prosecutions can be made without regulations. The following remarks are intended to elucidate the situation, particularly for archeologists.

The Act, rather than using the term "antiquity," defines an "archaeological resource." An archeological resource ". . . means any material remains of past human life or activities which are of archaeological interest. . . ." At this point, the quirk begins. Remains of archeological interest must be ". . . determined under uniform regulations promulgated pursuant to this Act." The law, however, has a saving clause in that "Such regulations containing such determinations shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items." (Emphasis added.) Thus, not all parts of an archeological site are necessarily an "archaeological resource." "Pit houses" and "structures" are specifically referenced but many things remain unclear. For example, is a tipi ring a "structure" or how about a firepit? Middens, trash dumps, shell mounds and other areas where archeological evidence collects rather than is placed would seem not to fall under the provisions of the statute. We can safely assume that once the regulations are promulgated, this situation will be corrected, however, until that time, it will be necessary to operate within the limits of the Act, and archeologists who appear in court will need to adjust their thinking accordingly. In the following sections, I will explain the effect of the definition on the Shumway case and then offer some suggestions for building cases under the Act until the regulations are promulgated.

## Archeological Resource and the Shumway Case

Fike (1980) has pointed out that the Turkey Pen Ruin, which Shumway was alleged to have vandalized, consists in part of an extensive midden deposit. This midden became the focus of the trial. The artifactual

materials presented in evidence, while including several items listed in the Act, were introduced late in the trial and never formed part of the dollar value estimate. In charging the jury, Judge Winder made it very clear that the jury was to use only the list of items provided in the law in defining an archeological resource. After 9 hours of deliberation, the jury sent Judge Winder a note asking if "midden" was an archeological resource. The judge, of course, responded that it was not since midden is not one of the items listed in the Act. At that point, the jury found the defendant not-guilty under the Act, but took only an additional 10 minutes to find him guilty under the Depredation of Government Property statute. A midden may not be (for the time being) an archeological resource but it is Government property if located on Government land.

Prior to the trial, counsel for the defense asked that the case be dismissed on the grounds that: 1) the Act required the promulgation of regulations defining an archeological resource as a predicate to its enforcement; 2) that the Act is constitutionally vague ". . . in that it fails to convey a sufficiently definite warning as to the proscribed conduct particularly in regard to the definition of an 'archaeological resource;'" and 3) that the term "archaeological value" ". . . fails to establish a standard for determining the severity of the penalty of the crime" (Wilcox and Hansen 1980).

In reply to the above motion, the U.S. Attorney argued the following: 1) the definition in the law is self-executing without regulations and promulgation of regulations constitutes an expansion of the definition not the definition itself. He further argued that the intent of Congress was to have the statute take effect immediately ("The prohibitions contained in this section shall take effect on October 31, 1979." 18 U.S.C. § 470ee(e)), rather than waiting for regulations; 2) the Act does, at minimum, prohibit the excavation, removal, damaging, alteration or defacing of the items listed. He further conceded that "While it is true that additional archaeological artifacts may be added by regulation, such items are not of concern in these proceedings."; and 3) with regard to "archaeological value," the term is no more ambiguous than "commercial value" and that the Government was ". . . prepared to offer testimony from expert archaeologists, who are accustomed to valuing archaeological resources, concerning the archaeological value of the pillaged resources" (Wikstrom 1980). Thus, by consenting to hold the definition of archeological resource to those items listed in the law and by providing expert testimony on value, the U.S. Attorney was able to persuade Judge Winder to deny defense motion to dismiss.

## Getting By Without Regulations

Wikstrom (1980) has listed four elements of proof which are required under the Act: 1) that defendant did knowingly excavate, remove, damage, alter or deface an archeological resource; 2) that said resource is located on public lands; 3) that defendant acted without a permit; and 4) that the archeological value, commercial value and cost of restoration and repair exceed $5,000. This fourth proof is needed only if a felony charge (2 years and $20,000) is brought. I'll discuss each element of proof in turn.

Proof 1 has three elements: 1) knowingly; 2) excavate, remove, damage, alter, deface; and 3) archeological resource. Some archeologists have felt that inclusion of the term "knowingly" makes the Act difficult to prosecute and that the term should have been excluded from the law. The term, however, was necessary in order to get the felony penalties. The term does not create problems since it is used and understood by the courts to refer to a "general intent" crime and not a "specific intent" crime. Robert Collins, (1980) former U.S. Attorney and drafter of the criminal penalties portion of the Bill, explains that "knowingly" merely means that the prohibited actions are done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The person need not know that his actions violated the law or even that there was a law prohibiting his actions. Moreover, the person does not have to know that he was on Federal land to violate the Act.

Archeologists normally do not have trouble with the terms excavate, remove, damage, alter, and deface and can testify with competence in the courtroom when such has been done. In this context, it is usually better not to confuse the issue by trying to explain that the pothunter "excavates" a site much differently than an archeologist. This distinction is best handled later when value is being assessed. It should also be remembered that alter and deface are just as much prohibited as excavate, remove and damage and that the former terms are especially useful in cases dealing with rock art.

We have already discussed the limitations imposed by the way in which "archaeological resource" is defined. In helping prepare a case, and in testifying, archeologists should be careful to relate primarily to the list of items included in the Act. Remember that "any portion or piece" is covered by the definition, that "arrowheads" on the surface of the ground are exempt and the items must be 100 years of age. It should also be noted that the Act does not make it legal for a person to remove "arrowheads" from Federal lands. It only means that they may not be prosecuted under this particular Act for so doing. They would still be subject to prosecution under the 1906 Act (outside the Ninth Circut) and to prosecution under Theft of Government Property anywhere in the Nation. If on Forest Service land, they could be prosecuted under Secretary of Agriculture regulation concerning prohibited acts (36 CFR 261.9). The National Park Service also has authority under 36 CFR 2.20. However, other Department of Interior agencies within the Ninth Circuit may have problems with the Secretary of Interior's Prohibitions (43 CFR 3) since they cite the 1906 Act as authority.

The second element of proof, that a resource is located on public lands, will usually not involve the archeologist since such testimony is better given by the land manager or professional surveyor. The third element of proof, that a defendant acted without a permit, is also normally left to the land manager although Federal archeologists, if they administer the permit system on a given piece of land, may do the testifying. The question has been raised whether an individual can be prosecuted since without regulations there are not procedures for issuing a permit. The point is well taken since the Act proscribes the conduct ". . . unless such activity is pursuant to a permit. . . ." This creates a due process problem if there are no mechanisms for permit issuance. To get around this

problem the Departments of Agriculture and Interior have issued notices in the Federal Register (Vol. 45, No. 42, February 29, 1980, and Vol. 45, No. 16, January 23, 1980) that permits under the Act will be ". . . processed under regulations promulgated pursuant to Sections 3 and 4 of the Antiquities Act of 1906." This is a legitimate procedure since the Act is not an amendment to nor a replacement for the Antiquities Act.

The fourth element of proof requires an estimate of $5,000 value which can be computed over four items: 1) archeological value; 2) commercial value; 3) restoration costs; and 4) repair costs. In the Shumway case, the writer was asked to define these four items for the court. I did so in the following manner:

1. The term "archaeological value" means the cost of retrieval of scientific information from an archeological resource in its undisturbed or undamaged state and includes the cost of the research design, fieldwork, laboratory analysis, and written report.

2. The term "commercial value" means the fair market value of an archeological resource.

3. The term "cost of restoration" means the cost of retrieval of scientific information from the disturbed or damaged portion of an archeological resource through archeological excavation and/or analysis including a sufficient portion of an adjacent nondisturbed comparison base and includes the cost of the research design, fieldwork, laboratory analysis, and written report.

4. The term "cost of repair" means the cost of the physical repair of archeological resources which have been damaged or disturbed in order to return said resources to the condition existing prior to the damage or disturbance.

Note that restoration and repair are not defined as synonymous. Restoration is the act of returning to the American people whatever value can be returned given the condition of the resource. Thus, the act of restoration involves normal archeological research procedure. Repair, on the other hand, is confined to reconditioning the resource regardless of whether any research is necessary. I believe it very important that these distinctions be kept separate to allow maximum flexibility in using the value provisions of the Act. The distinction is well illustrated by the Smyer-May case (Collins and Green 1979, Green 1978), in which seven vessels were returned to the United States but only one is positively known to have come from the pothunted site in question. All seven vessels were originally broken and subsequently put back together by defendants or their acquaintances. The repair was done without skill, resulting in the need to disassemble the pottery and repair it to display and analytical standards. The cost of this repair has been assessed against the defendants but no restoration costs were assessed on these vessels since they are now in possession of the Government and there is little research potential as positive context of the vessels is unknown.

The following suggestions are offered for computing costs for the four value categories.

1. Archeological Value. This category is the easiest and most straightforward for archeologists since it coincides with standard project computations. The critical decision is usually how much area of the site to include. As a general rule, only that portion of the site which has been disturbed should figure in the cost computations. However, in cases where very little of the site remains, it may be reasonable to include the entire site. Remember that the computations are to be based on the site in its supposed undisturbed condition. One should be careful to include only those items which one is confident would have been present. Padding the costs or including analysis for which there is no evidence may be challenged by the defense attorney and, thus, cast doubt on other computations. Finally, it should be remembered that this category can only be used with sites which contain "pit houses" or "structures" which have suffered damage.

2. Commercial. This category should only be computed by an archeologist if it can be demonstrated that he/she has expertise in making commercial appraisals. Otherwise it is best to get a dealer or museum buyer to testify if possible. Sometimes it is difficult to get someone to appraise an artifact and sometimes the market value is not high enough to warrant using this category at all. Other possibilities for assessing value include statements by defendants as in Smyer-May where one of the defendants admitted to having sold two pots for $4,000 and that was accepted by the Forest Service as the commercial value for purposes of that case. We have also used insured value of museum collections by comparing artifacts from the damaged site with comparable specimens from museum collections. However, if this approach is taken, care needs to be exercised in assuring that the insured value is based on a current (less than 5 years, if possible) appraisal.

3. Restoration. Cost computations in this category are carried out parallel to those under 1 above, except that here we are dealing only with the disturbed portion of the site plus a small sample of undisturbed for comparative purposes. The critical issue in figuring costs is to emphasize those items listed in the definition. When regulations are available the emphasis can switch to the site but until that time the focus must be on the list of items and how the context from which they have been removed needs to be investigated in order to return the value to the American people. Here again, every effort should be made to use cultural resource specialists who are accustomed to budgeting archeological research and can be qualified as expert witnesses. Generally, it is better to use a junior archeologist who handles the day-to-day costing of projects than a senior archeologist who may know more archeology but hasn't figured a budget in 10 years. In all cases, the archeologist who prepares the budget should examine the site first hand, as well as the artifacts which will be entered in evidence and used in the costing. Be sure the examination of the artifacts takes place in the presence of the evidence officer.

4. Repair. Avoid the tendency to confuse, or treat as synonymous, this category with that of restoration. As in all the above costing, individuals should be used who can be qualified as experts in the costing concerned. Except for pithouses and structures, the cost of repair to a site cannot be used until the regulations arrive. Site repair may include

such items as backfilling, reseeding, contouring to avoid erosion, etc. Repair of artifacts can include costs of assembly of pottery, human bone or other broken items and/or conservation of human bone or other fragile specimens.

In all of the above, the costs should be computed on a basis which is reasonable and defensible in court. This does not mean that one should skimp on the research design or take a big cut in institutional overhead, but it does mean that the costs of a new camera or similar liberties should not be taken.

Finally, a few tips on the costing issue in general. First, it should always be clear in the mind of the archeologist doing the costing that he/she will likely be called upon to testify in court. Anyone who is reluctant to offer testimony should also refuse to do the costing. A good set of notes should always be taken during field, artifact examination or other phases of the work. Dates, times, and places are important and may be needed to refresh ones memory on the witness stand since trials often occur many months after your work is done. In filing costs figures and reports, keep remarks to a minimum and never comment on any aspect of the case not directly related to potential testimony. The more one says, the greater opportunity a defense attorney has to seize on an unrelated or nonissue in an attempt to confuse or distract a jury.

## Civil Penalties

The above information on costing is directed toward the criminal provisions of the Act. All that is involved is a determination of whether any dollar values in the four categories together, or separately, exceed the sum of $5,000. The civil penalties portion of the Act cannot be used until the regulations have been promulgated although Federal agencies may continue to bill for civil damages under the Federal Collections Act of 1966 (31 U.S.C. 952). See Lear (1979) for details of this process. Actually, cost estimates for the criminal portion of the Act will be usable under the civil penalties section, although charging both "archaeological value" and "restoration costs" would not, in my estimation, be fair. "Commercial value" is interesting in that for the criminal portion of the Act it is necessary to establish the value but not necessary to prove that the values have been lost or are not recoverable. This is because the criminal portion is concerned with intent as well as actual loss. Under the civil portion, it seems to me that a defendant would be billed for the commercial value only if the object was not retrieved by the Government.

## Forfeiture

The forfeiture provision of the Act is another example of a self-executing provision and is not totally dependent on regulations. It provides that all "archaeological resources" and all "vehicles and equipment" are subject to forfeiture to the United States upon conviction under criminal provisions, upon assessment of a civil penalty, or upon a court determination that the resources, vehicles or equipment ". . . were involved in such

violation." Thus, it is not necessary to get a criminal conviction in order for forfeiture to occur. As of this writing (June 1980) this provision has not been used in any of the cases that I am aware of, however, it is being considered in at least one case. Using this provision in future situations will undoubtedly occur and since regulations are necessary for the civil assessment portion of the Act it is important to get them promulgated since the deterrent effect could save many sites. It should be noted that forfeiture can occur if a civil penalty is merely assessed. It is not necessary that a civil conviction occur nor that the penalty be paid or unpaid.

## How to Prepare Restoration Damage Estimates

While every situation will be somewhat different there are a couple of points that need to be kept in mind when one prepares a damage estimate for archeological resources depredation. First, the principle of "reasonableness" should prevail throughout. One must remember, however, that ultimately reasonableness will be determined by the court. Nevertheless, that determination will be influenced by the ability of the testifying archeologist to articulate both what was done and why the doing of it mattered. Thus, any action in preparing the cost estimate should only be undertaken by the archeologist if he/she is willing to testify in court as to the validity of the action. But testifying to the validity is not enough. The position has to be defensible to a lay audience and expressed in terms that they can understand. The above is not an argument for doing less of an archeological job. Rather, it is an argument for doing a very good archeological job especially in terms of making what we do and why we do it both explicit and understandable.

Next I shall explain the procedures I have used in the field for determining which areas of a site are to be considered in the costing and how specific segments of a site can be dealt with. Remember that in restoration we are talking about the "disturbed or damaged" portion of a site along with a sufficient portion of the adjacent "nondisturbed site as a comparison base." The above assumes, of course, that a nondisturbed area exists.

When the total site has essentially been destroyed the problem is easier. One can simply measure the site dimensions, usually taking depth from a nearby pothole, and come up with a volume of that which will need to be delt with. Feature observations and data on pollen, C14, tree-ring potential, various soil analysis, human bone, shell, lithic, ceramic, and other analysis will, of course, be dependent on a judgment of the site's potential to yield information in these areas. Evidence for analytical needs is best obtained from the site itself. If the site situation is equivocal the archeologist is free to rely on "expertise," preferably his/her own but also that in the literature. Remember that in court you will probably be qualified as an expert witness which will allow you to testify to things which you believe to be true not just those things to which you are a personnal witness. Thus the archeological literature can be used as valid comparative material.

The situation is more complex where a site has both undisturbed and disturbed deposits. The first thing one needs to know is which portions of the site are associated with the depredation under investigation. There is little or nothing to be gained by computing cost figures for potholes which are beyond the scope of proof for the case under investigation. A close working relationship with the investigating officer is imperative at this stage. Sometimes an archeologist can point the way to a piece of evidence that will tie a suspect to a particular damaged area. Although you may be examining the site with the specifics of a dollar estimate in mind, it never hurts to be alert for other considerations and to bring these to the attention of an investigator. Once the areas for examination have been defined, they should be assigned some sort of reference number and plotted on a map. If you are a consulting archeologist brought in by a Federal agency, this task may have already been accomplished. The important point, is that a single reference system should be used in order to avoid confusion in the courtroom. If the referents have already been established, use them; if not, agree on a single system.

A guiding principle for determining exactly which pieces of the site will be used in the cost analysis is to ask yourself what is the logical behavioral unit under consideration. Is it a room or feature constructed by the prehistoric inhabitants, or a test square or trench? If a room or feature has been disturbed then that is the relevant cultural feature which demands restoration and costs should be computed for excavation of the entire room. When dealing with potholes in midden or trash deposits, some additional considerations are involved. Such holes are seldom dug in squares or rectangles the way an archeologist would dig them. In my view, the pothole needs to be "dressed" in such a way that it would conform to a straight-sided and level-floored or sterile-deposit excavation. This may involve removal of moderately-sized undisturbed deposits, some simple wall straightening or both. Pothunters often like to tunnel or dig antechambers in their holes. When this occurs, I bring the excavation line back away from the edge of the pothole far enough to encompass the underground extension. This adds volume (hence cost) to the estimate but is, I believe, reasonable. Since archeology is pursued in square or rectangular pits, the irregular potholes should be set within such a regular unit. I do not advocate running a series of lines around the pothole just to straighten up the uneven sides. We impose our horizontal and vertical control for very good reasons and there is no reason to abondon them just because of some pothunter. What we need to remember is that while we would probably not have chosen units of the size imposed by the pothole, nor even necessarily the same location for an excavation, we should treat the pothunters hole as if it were a "real" unit.

Once the decisions have been made about the boundaries of the "cultural units," their dimensions should be recorded. Vertical depth may sometimes have to be estimated although bottoms of potholes can be a guide. As a general rule estimates should include work to the floor of a room and usually beneath. At times you may be permitted to do a slight amount of trowling in order to clarify a profile or check the bottom of a pit. You must, however, <u>always</u> check with the investigating officer prior to making any disturbance and then, if permission is given, make as little distur-

bance as possible. The units which are defined by boundaries and location should be treated as the "excavation units" you would have put in the site as an archeologist except that some portion of the earth has already been removed. You do not compute the removal cost of the voids.

Depending on the nature of the case, you may be asked to deal with the spoil dirt from the pothole. Here again, estimating volume needs to be based on the size and depth of the pile. Beware of overestimating if dirt is present from several pothunting events some of which are not being charged in the present case. Sometimes the spoildirt is screened in an effort to obtain additional artifactual evidence for the case. When this happens, the screening costs are part of the investigation costs and may not be charged to the defendant. However, you will usually be asked to estimate the costs for analysis of the artifacts recovered. When you are involved with examining materials which will be used as evidence at the trial, be sure that you always do so in the presence of the responsible evidence officer.

A smart defense attorney is always looking to break the evidence chain and could even go so far as to imply that evidence tampering has or could have occurred if the evidence officer was not present.

Sometimes the most difficult part of the cost estimation is that of artifact analysis. Numbers and kinds of artifacts have to be delt with as in any standard excavation. But an important consideration not usually associated with a well-provenienced excavation is an attempt to determine, to the extent possible, the provenience of the artifacts removed from context.

The actual figuring of the budget should be done using the current figures of the university or institution you represent. Salary, travel, supply, analysis, overhead or any other costs should all be figured at the going rate. The budget should not be padded neither should it be shortchanged. In cases where two different rates are available, as sometimes occurs with overhead, the lowest should be used. The budget can be prepared in the same format customarily used by the institution. It is wise not to include explanations of the figures as a written supplement to the estimate. Save this for courtroom testimony if asked. There is no need to volunteer information especially since it might be useful to defense counsel in seeking to divert the jury from the real issues.

In putting it all together remember; the estimate should be reasonable, use defensible "cultural units," use current institutional figures, and communicate closely with the investigating officers. And it should always be remembered that you will probably be called on to testify before a judge and jury to whom you must explain what it is you have done and why. It helps to know that as you go along, not invent it later.

## Other Cases

Beside the Shumway case and those cited by Fike (1980) from Utah, additional cases have been concluded and are pending in Arizona. The dubious distinction of being the first person to go to prison under the Act

belongs to Robert Gevara who was sentenced to 1 year in jail and a $1,000 fine on May 19, 1980. He was followed by Kyle and Thayde Jones on June 2, 1980, who were sentenced to 1 year in jail and a $1,000 fine, and 18 months in jail and a $1,000 fine respectively. Thayde Jones, thus, becomes the first individual to be sentenced under the felony provisions of the Act.

The Jones, Jones and Gevara (McAllister 1979) case is particularly interesting since they were apprehended digging on the Tonto National Forest in 1977. They were charged under Destruction of Government Property (18 U.S.C. 1361) but the case never came to trial. In a preliminary hearing, defense moved dismissal and Judge William P. Copple did so on the basis that the case should have been brought under the specific statute relating to the offense (i.e., the 1906 Antiquities Act) which had been held unconstitutional by the Ninth Circuit as a result of the Diaz decision. The United States appealed the decision and Judge Copple was overturned and the case was remanded for trial. Defendants then asked the Supreme Court to review the case but were turned down. In the meantime, the Archaeological Resources Protection Act had been passed. Since penalties under the Destruction statute could go as high as 10 years in jail verses 1 or 2 years under the Act, defendants asked to plead guilty under the Act and were granted permission to do so. Thus, we have a situation where a crime committed before passage of the Act has resulted in the first jail terms under the Act.

In a case where the alleged crime was committed since the passage of the Act, an Arizona Grand Jury has failed to return an indictment since they purportedly had difficulty with the cost figures presented by the U.S. Attorney. From a first-hand examination of both the site involved and the costs presented, it is my opinion that they were not unreasonable. In fact, if anything, they were too low. While another attempt will be made to get an indictment, there is a clear message that archeologists need to get the public educated with regard to the value of the prehistoric past.

## Summary

In less than a year since its passage, the Archaeological Resources Protection Act has been used against seven individuals; six of whom have been convicted and fined, and three of whom have been sent to prison. The fourth was found not-guilty but was convicted under Destruction of Government Property. Additional cases under the Act are currently being pursued. While there are some problems with lack of regulations, including the inability to charge civil penalties and limitations with the definition of "archaeological resource," the Act is usable and has produced results.

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